

STATEMENT OF

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ON

THE FREEDOM OF INFORMATION ACT

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Mr. Chairman, Members of the Subcommittee on the Constitution, it is a pleasure to have this opportunity to appear before you today to discuss the Freedom of Information Act's impact on the Intelligence Community. There are unique and particularly serious problems being experienced by the Central Intelligence, National Security, and Defense Intelligence Agencies under the FOIA which stem, in part, from the inherent contradiction of applying a statute designed to assure openness in Government to agencies whose work is necessarily secret. The adverse consequences of this application have caused intelligence functions to be seriously impaired without significant counterbalancing of public benefit. Mr. Chairman, we need to address the fundamental question of whether it makes sense for the FOIA to be applicable to our Nation's most sensitive intelligence agencies.

The Freedom of Information Act was first passed in 1966. President Johnson described the Act as stemming from the principle that "a democracy works best when the people have all the information that the security of the Nation permits." The declared purpose of the Act was to broaden access to government information connected with activity impacting upon the public, with certain exceptions in areas in which Congress believed exemptions were warranted in the national interest. From 1966 until the Act was amended in 1974, there was no major impact upon the day to day functioning of the Intelligence Community. Then, in 1974, during the post-Watergate period of pressure for more openness in government, amendments to the FOIA were enacted over President Ford's veto. The Supreme Court's decision in EPA v. Mink was a key impetus for these amendments. The Supreme Court had ruled that an agency must examine classified documents before invoking the FOIA exemption permitting such documents

to be withheld from disclosure, but that it was not for the courts to rule on whether the classification itself might be unwarranted.

The 1974 amendments made several fundamental changes in the Act, the most notable of which:

- 1) Required that reasonably segregable portions of a document not falling under the Act's exemptions be provided to the requester; and
- 2) Gave the courts authority to review agency determinations that records were withholdable under the Act. The courts have subsequently placed an enormous burden upon the intelligence agencies to justify classification claims. In one case a federal court has overruled the judgment of professional intelligence officers that information is properly classified.

The amendments led to an explosion in FOIA requests directed at the CIA, and a corresponding increase in associated litigation. Resources and manpower devoted to FOIA matters have, of course, increased tremendously since the mid-1970's. The CIA's latest annual report on its administration of the Act contains the following statistics for calendar year 1980:

- 1212 new FOIA requests were logged during 1980.
- 257,420.5 actual person-hours of labor (or 144 person-years) were devoted to the processing of Freedom of Information Act, Privacy Act, and mandatory classification review requests, appeals, and litigation, as compared with the 110 person-years of labor devoted in 1979. More than half of these resources were devoted to the processing of requests for subject matter information under the FOIA.
- Over \$3 million was expended in personnel costs for processing, appeals, and litigation related to these requests. About two-thirds of this amount was spent on FOIA requests.

Mr. Chairman, if gross personnel and resource figures represented the major problems then there would be an obvious solution. The last seven years have shown, however, that the Intelligence Community faces

other problems even more important and far more unique. These problems which I shall outline, stem from the fundamental incompatibility of applying the FOIA to intelligence agencies whose missions must be conducted in secret.

The search and review of records in response to FOIA requests poses a special set of problems. The CIA's records systems, for example, are an integral part of the Agency's security system. The need to protect intelligence sources and methods through a complex system of compartmented and decentralized records is in direct conflict with the concept of openness under the FOIA. Under the "need to know" principle CIA employees normally have access only to information necessary to perform their assignments, but the process of compiling documents responsive to FOIA requests is incompatible with good "need to know" practices.

The search for information responsive to an FOIA request is a time-consuming task. A relatively simple FOIA request may require as many as 21 CIA record systems to be searched, a difficult request over 100. I must emphasize, however, that it is not the quantity of time and effort devoted to FOIA that is of ultimate concern to us. It is rather the level of employee who must become involved in the review process. By this I mean the types of highly trained people who must participate in the processing of an FOIA request.

When we locate records in response to an FOIA request, the documents must be carefully reviewed in order to determine which information can be released safely and which must be withheld, in accordance with applicable FOIA exemptions, in order to protect matters such as the security of CIA operations or the identities of intelligence sources. In other government agencies the review

of information for possible release under the FOIA is a routine administrative function; in the Central Intelligence Agency it can be a matter of life or death for human sources. In some circumstances mere acknowledgment of the fact that CIA has any information on a particular subject or has engaged in a particular type of activity could be enough to place the source of that information in danger, compromise ongoing intelligence operations, or impair relations with foreign governments. Agency records must be scrutinized with great care because bits of information which might appear innocuous on their face could possibly reveal sensitive matters if subjected to sophisticated analysis or combined with other information available to FOIA requesters.

This review is not a task which can be entrusted to individuals hired specifically for this purpose, as is the case with many other government agencies whose information has no such sensitivity. The need for careful professional judgment in the review of intelligence information surfaced in response to FOIA requests means that this review requires the time and attention of intelligence officers whose primary responsibilities involve participation in, or management of, vital programs of intelligence collection and analysis for the President and our foreign policymaking establishment. Experienced operations officers and analysts are not commodities that can be purchased on the open market. It takes years to develop first-class intelligence officers. Again, let me emphasize that these reviewing officers are not FOIA professionals, they are intelligence officers who are being diverted from their primary duties. This diversion is impacting adversely upon the fulfillment of vital intelligence missions.

Mr. Chairman, efforts to fulfill our intelligence missions while subject to the provisions of the FOIA have placed the CIA in a vicious cycle. Intelligence information must be processed and analyzed quickly if the President, the Cabinet, and the Congress are to receive the latest and most accurate assessments of foreign developments. The need for up-to-the-minute information frequently prevents the review of FOIA documents from taking place in keeping with the time requirements of the Act. This results in the Agency being sued for failure to comply with the Act, which, in turn, requires an even greater amount of time and effort to be expended in the litigation process. The defense of such suits, as well as those that are brought because of a denial of the information requested, requires the time and effort not only of lawyers at the Agency and the Department of Justice, but also of intelligence officers directly concerned with the request in question. Factual submissions must be presented by substantive intelligence officers, again diverting them from their primary duties. Therefore, despite an increase in the manpower devoted to FOIA review in 1980, the backlog of unanswered requests increased by 400 cases. Mr. Chairman, I am concerned that when the work of senior intelligence officers is diverted to FOIA concerns because information must be reviewed, or because court affidavits must be prepared under strict time constraints to justify a delayed response or a previous denial of information, the ability of our Nation to formulate an informed and successful foreign policy suffers.

The CIA has been sued 198 times under the FOIA. The result, with one exception, has been judicial affirmance of the claimed national security exemption. One recent example is the decision in a lawsuit brought by Phillip Agee against the CIA, FBI, NSA, Department of State,

and Department of Justice. In his opinion, Judge Gerhard Gesell of the U.S. District Court for the District of Columbia stated: "It is amazing that a rational society tolerates the expense, the waste of resources, the potential injury to its own security which this process necessarily entails." The fact remains, however, that judges with no expertise in the arcane business of intelligence may believe that under the provisions of the Act they can overrule an intelligence agency's decision as to the classification of particular documents and order their release. In the one exception I mentioned, the Court of Appeals has upheld a district court decision specifically overruling a CIA classification determination. Final resolution of this case is still pending. While we have succeeded thus far in protecting sensitive national security information, our litigation record has been achieved at an enormous cost in the kind of quality resources which I described earlier.

Mr. Chairman, I would like to add one other point which is related to the FOIA process. The Freedom of Information Act currently contains exemptions for classified documents and other matters that are set forth as exempt from disclosure. These exemptions have generally been adequate to protect sensitive national security information. Even with the best of review systems using the best talent, however, there are hazards, because human error is always a possibility. Such errors have in fact occurred, resulting in the inadvertent disclosure of sensitive intelligence information. These unintentional disclosures are constant reminders of the risk which will be present so long as the intelligence agencies are subject to the Act. The handling of FOIA requests involving intelligence information by other agencies has also resulted in some serious

compromises of classified information relating to intelligence sources and methods. Compounding these problems are attempts by requesters to gain additional classified information based upon these compromises.

Mr. Chairman, the FOIA further impedes our nation's intelligence efforts through the perception it has created overseas. While the perception of our country's inability to keep secrets may be caused by leaks, unreviewed publications by former officials and the like, it is the FOIA that is viewed as the crux of this problem. Individual human sources and foreign intelligence services are aware of the Act; they view it as a threat to our country's ability to maintain the confidentiality of its intelligence sources, and to protect the information they provide. An intelligence agency cannot operate effectively under such conditions. Human intelligence is as important today as it has ever been. To obtain this intelligence it is vital that there be confidence in the ability of the United States Government to honor assurances of secrecy. It must be remembered that many individuals who cooperate with the intelligence efforts of the United States do so at great personal risk. Identification as a CIA agent can ruin a career, endanger a family, or even lead to imprisonment, torture, or death. We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be kept secret and that the information they provide will never be revealed or attributed to them. The FOIA has raised doubts about our ability to maintain such commitments, despite our explanations that the Act provides exemptions which allow for the safekeeping of sensitive information. The concept of an intelligence agency being subject to an openness in government statute is not uniformly understood by individuals and intelligence services abroad.

It has been necessary to spend a great deal of time attempting to convince foreign intelligence services that they should not discontinue their liaison relationships with us because of the FOIA. The very fact that CIA files are subject to search and review for information which is releasable is extremely disturbing to our sources. There have been many cases in which individuals have refused to cooperate with us, diminished their level of cooperation, or totally discontinued their relationship with our people in the field because of fears that their identities might be revealed through an FOIA release. What we will never know, Mr. Chairman, is how much valuable information has been lost to the United States due to the reluctance of potential human sources to even begin a relationship.

Mr. Chairman, beginning in 1947 this country made a conscious decision that it needed intelligence agencies as part of its national security fabric. The application of the FOIA to these agencies is causing a weakness in that fabric. It must be remembered that intelligence activities are focused on the acquisition of sensitive information abroad for foreign policymakers, not for the general public. Information which is released under the Act is generally extremely fragmentary and it can often be misleading. Mr. Chairman, I would note that certain organizations have published lists of books and articles said to be of public interest which supposedly were based on information released by intelligence agencies under the FOIA. The argument is made that these materials could not have been published without the FOIA. I believe that such claims are grossly exaggerated. The FOIA has not resulted in the revelation of fundamental information but has instead been used to garner additional details about subject matter which was originally either revealed by

one of the intelligence agencies on its own, or in the course of investigations such as those conducted by the Rockefeller Commission or the Church Committee.

Mr. Chairman, the FOIA has never been an effective oversight mechanism for the Intelligence Community and the idea that it is needed to ensure that the abuses and excesses of the past do not recur ought to be laid to rest once and for all. The fragmentary information obtainable under the FOIA has not, cannot, and will not ever remotely compare in value with the congressionally established oversight responsibility which has been given to the select committees on intelligence in the Senate and House of Representatives. These two committees are specifically responsible for overseeing authorizations of appropriations and operations of the various intelligence agencies. I believe that it is fair to say that no other agencies in the Government are subject to such close congressional scrutiny on a permanent, ongoing basis. It is this system of vigilant and effective congressional oversight, along with extensive Executive branch review mechanisms, which provides the means through which the American people are assured that the operation of their intelligence agencies is in accordance with applicable law.

Mr. Chairman, the President has stated his determination to enhance the Nation's intelligence capabilities, and I am committed to work toward achieving that goal. To do this, our intelligence agencies must be able to focus their energies on the timely and accurate gathering and analysis of information in a manner which insures the secrecy of the sources and content of that information. For the reasons I have stated, I believe the current application of

the FOIA is inappropriate, that it is detrimental to the accomplishment of intelligence missions, and that it is unjustified by its insignificant public benefit.

Several bills introduced this session would impact on the FOIA's applicability to the Intelligence Community and to Federal law enforcement agencies. S. 587, introduced by you, Mr. Chairman, would appear to meet the needs of the law enforcement agencies. While the portions of the Bill which would apply to the intelligence agencies would be of benefit, the fundamental problems which I have just outlined would not be fully alleviated. Senator D'Amato's Bill, S. 1235, is a laudable legislative proposal which seeks to relieve the CIA of some of the burdens associated with the FOIA by strengthening the exemptions in the Act under which information can be withheld from disclosure. Unfortunately, Mr. Chairman, I do not believe that the Intelligence Community's problems under the FOIA can be substantially alleviated by strengthening the grounds upon which information can be withheld from public disclosure under the Act. Senator Chafee's Bill, S. 1273, takes a different, more promising approach in its effort to seal off certain categories of files from the entire FOIA process, including search and review. I believe that Senator Chafee's Bill, if enacted, could have a major positive impact. But Mr. Chairman, I also believe that the time has come for the Congress to face the issue squarely and definitively, and to recognize that only a total exclusion of records created or maintained by the Central Intelligence Agency, the National Security Agency, and the Defense Intelligence Agency from all of the Freedom of Information Act's requirements can, by completely eliminating the need to search and review records in response to FOIA requests, end the wasteful and debilitating diversion of resources

and critically needed skills, eliminate the danger of court-ordered release of properly classified information, and regain the confidence of human sources and foreign intelligence services.

Mr. Chairman, I would like to add one footnote to my testimony before you today. Nothing which I have said should be construed to indicate any lessening in our belief that individual Americans should continue to be able to determine whether or not an intelligence agency holds information on them, and to obtain this information when security considerations permit. I wish to state categorically that the Intelligence Community would continue full compliance with the Privacy Act even if totally excluded from the FOIA.